LIBRARY
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1954

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

against

WILLIAM DIXON, et al., as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

J. RAYMOND HANNON,
Corporation Counsel,
City of Yonkers, N. Y.

JOHN PRESTON PHILLIPS,
Second Assistant Corporation Counsel,
City of Yonkers, N. Y.,
City Hall,
Yonkers, N. Y.

INDEX

PAGE

STATEMENT OF PURPOSES OF BRIEF 1

STATEMENT OF JUDICIAL PROCEEDINGS, NEW YORK STATE COURTS, TO TIME OF FILING OF PETITION 3

ARGUMENT:

I. The petition does not state facts to establish that the respondents have failed to perform a duty specifically enjoined upon them by law 5

II. The petition fails to show a clear legal right of petitioner to the relief demanded or to any other relief on the merits 6

III. The rights guaranteed by the First and Fourteenth Amendments are subordinate to the greater rights of the general public interest ... 8

IV. This proceeding does not present a substantial Federal question which should be reviewed by this Court 9

V. Conclusion 9

TABLE OF CASES CITED

Chaplinsky v. New Hampshire, 315 U. S. 568 8

Halvajian v. Board of Education of City of Inglewood, 341 U. S. 913 9

Hubert Work, Secretary of Interior v. United States on the relation of Logan Rives, 267 U. S. 175 5

Hubert Work, Secretary of Interior v. United States ex rel. Chestatee Pyrites & Chemical Corporation, 267 U. S. 185 5

In the Matter of James R. Ellis, as President of the Yonkers Committee for Peace, etc. v. William Dixon, et al., as Members of the Board of Education of the City of Yonkers, 281 A. D. 987 4

In re Donovan, et al., 65 N. Y. S. 2d 347 7

In re Poland Milk Producers Cooperative Ass'n Inc., et al., 62 N. Y. S. 2d 794 7

PAGE

Kiyaski Omato v. United States, 152 F. 2d 905 8

Lyon v. Compton Union High School, 341 U. S. 913 .. 9

Marshall v. United States, 176 Fed. Rep. 473 8
Matter of Burbridge v. Mangan, 173 Misc. 233, 237 .. 5
Matter of Burr v. Voorhis, 229 N. Y. 382 5
Matter of Colonial Beacon Oil Co., Inc. v. Finn, 245 A. D. 459, 461 5
Matter of Fahey v. Wright, 256 A. D. 474 8
Matter of Marburg v. Cole, 286 N. Y. 202, 208 7
Matter of Mulry v. Beckman, 272 A. D. 780 8
Matter of Small v. Moss, 277 N. Y. 501, 507 7
Matter of Stanton v. Board of Education, City of New York, 190 Misc. 1012 ..... 7, 8

Roy v. Board of Education, 106 N. Y. S. 2d 451 8

U. S. Painters Local Union 481, 79 F. Supp. 516 8

Whitney v. People, State of California, 274 U. S. 357 8

STATUTES CITED

New York Civil Practice Act, Article 78 ..... 3, 4
New York Civil Practice Act, Section 1293 3
New York Civil Practice Act, Section 1296 5
New York Education Law, Section 414 6

OTHER AUTHORITIES CITED

Constitution of the United States, First and Fourteenth Amendments 8

Opinion of the New York Attorney General, 51 (N. Y.) State Department Reports 135 6

Opinions of New York Commissioner of Education,
31 (N. Y.) State Department Reports 396 6
36 (N. Y.) State Department Reports 87 6
43 (N. Y.) State Department Reports 168 6
50 (N. Y.) State Department Reports 501 6

IN THE

Supreme Court of the United States

OCTOBER TERM 1953

No. 534

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

against

WILLIAM DIXON, et al., as members of the Board of Education, of the City of Yonkers, etc.,

Respondents.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This brief is respectfully submitted by the Office of the Corporation Counsel of the City of Yonkers, State of New York, in opposition to the prayer of the petitioner, James R. Ellis, as President of the Yonkers Committee for Peace, an unincorporated association, that a writ of certiorari be issued to review the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, affirming an order of the Supreme Court of the State of New York, County of Westchester, denying petitioner's application for an order requiring respondents to grant permission to the petitioner's organization for the use of a school building in Yonkers, New York, at a time and

place to be fixed in the order, and granting respondents' cross motion to dismiss the petition as a matter of law.

Respectfully submitted,

J. Raymond Hannon,
Corporation Counsel, City of Yonkers,
New York,

John Preston Phillips,
Second Assistant Corporation Counsel,
City of Yonkers, New York,
Office and P. O. Address,
City Hall,
Yonkers, New York.

Statement of Judicial Proceedings, New York State Courts, to Time of Filing of Petition.

The above entitled proceeding was instituted by petitioner, on or about the 30th day of January, 1953, for an order, pursuant to Article 78 of the New York Civil Practice Act, directing the respondents to grant the petitioner's organization the use of a schoolhouse in Yonkers for the purpose of a forum for the discussion of peace and war. In the petition to the Supreme Court of the State of New York, County of Westchester (Record, fols. 15-35), petitioner alleges that he is president of the Yonkers Committee for Peace, an unincorporated association, formed among residents of the City of Yonkers and of Westchester County for the object of arranging forums for the discussion of problems relating to peace against war (Record, fols. 16-20); that on May 14th, 1952 (Record, fol. 22) and on October 31, 1952 (Record, fol. 28) he made application to the respondents for permission to use the auditorium of one of the schools for the purpose of a forum for the discussion of peace and war and that the respondents denied such permission (Record, fols. 23-29). In paragraph 2 of the petition (Record, fols. 16-21) a statement of the purposes of the organization are set forth. Petitioner further alleges that respondents did not inform him of the reason for the denial of his application (Record, fol. 32); that respondents are concealing a design to discriminate against him and his organization and that the acts of respondents are arbitrary and unreasonable (Record, fol. 33) and violate the right of petitioner and constituent members of his organization of freedom of speech and assembly guaranteed by the Constitution of the United States and deny them the equal protection of the laws in violation of the Constitution of the United States (Record, fol. 34).

Respondents, pursuant to the provisions of section 1293 of the New York Civil Practice Act, moved to dismiss the

petition as a matter of law upon the ground that the petition is insufficient in law in that it does not state facts to constitute grounds for the relief sought therein; that the petition fails to show a clear legal right of petitioner to the relief demanded or to any other relief on the merits; that the petition does not state facts to establish that the respondents failed to perform a duty specifically enjoined upon them by law, and that the refusal of respondents to grant permission to petitioner's organization could be adequately reviewed by an appeal to the Commissioner of Education of the State of New York (Record, fols. 36-39).

After argument at a Special Term of the Supreme Court of the State of New York, the Court denied the application and dismissed the petition on the ground that the procedure under Article 78 of the New York Civil Practice Act was not available to petitioner and that the exclusive remedy was by an appeal to the Commissioner of Education. The opinion of the Court is set forth in full on pages 14-19 of the Record.

On appeal to the Appellate Division of the Supreme Court of the State of New York, Second Department, the Court unanimously affirmed the order of the Court below and held that the proceeding was properly before the Court but that the petition did not allege facts which established a clear legal right to the relief sought nor which established that respondents failed to perform a duty enjoined by law (*In the Matter of James R. Ellis, as President of the Yonkers Committee for Peace, an Unincorporated Association, Appellant, against William Dixon, Jr., et al., as Members of the Board of Education of the City of Yonkers, Respondents,* 281 App. Div. 987).

A motion for leave to appeal to the Court of Appeals was denied by the Appellate Division of the Supreme Court of the State of New York, Second Department, and by the Court of Appeals of the State of New York.

ARGUMENT

I.

The petition does not state facts to establish that the respondents have failed to perform a duty specifically enjoined upon them by law.

The petition (Record, fols. 15-35) does not allege that respondents, in refusing to grant to petitioner and his organization permission to use a school auditorium for the purpose of holding a forum for the discussion of peace and war, have failed to perform a duty specifically enjoined upon them by law.

To compel the issuance of a permit for the use of school property petitioner must show that the duty of respondents to issue such permit is positive and not discretionary.

> *Matter of Burr* v. *Voorhis*, 229 N. Y. 382;
> *Matter of Colonial Beacon Oil Co., Inc.* v. *Finn*, 245 App. Div. 459, 461;
> *Matter of Burbridge* v. *Mangan*, 173 Misc. 233, 237;
> *Section 1296, New York Civil Practice Act.*

Mandamus cannot be used to compel or control a duty by an officer in the discharge of which, by law, he is given discretion.

> *Hubert Work, Secretary of Interior* v. *United States on the Relation of Logan Rives*, 267 U. S. 175;
> *Hubert Work, Secretary of Interior* v. *United States ex rel. Chestatee Pyrites & Chemical Corporation*, 267 U. S. 185.

II.

The petition fails to show a clear legal right of the petitioner to the relief demanded or to any other relief on the merits.

Section 414 of the New York Education Law provides that the trustees or board of education of each school district may, subject to regulations adopted by them or it, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes, for any of the purposes set forth in said section.

The authority to grant permission for the use of school property, under section 414 of the New York State Education Law, is discretionary and not mandatory.

Opinion of New York Attorney General,
51 (N. Y.) State Department Reports 135;
Opinions of New York Commissioner of Education,
31 (N. Y.) State Department Reports 396;
36 (N. Y.) State Department Reports 87;
43 (N. Y.) State Department Reports 168;
50 (N. Y.) State Department Reports 501.

As pointed out in the opinion of the Supreme Court of the State of New York, Westchester County (Record, fols. 41-55), many factors may be taken into consideration by the administrative body in making its determination, and the board is presumed to have knowledge of local conditions and to know the sentiment of the taxpayers and voters of the district and may find that the sentiment of the community is divided as to the propriety of the use and may properly refuse a request the granting of which would result in dissatisfaction and criticism. Unquestionably the respondents had knowledge of the fact that a forum held

by the Yonkers Committee for Peace at the Young Women's Christian Association in the City of Yonkers on November 19th, 1951 created considerable dissatisfaction and criticism among some of the citizens and veterans organizations of the City, the forum having been publicized in many issues of the local newspaper before and after it was held and took this into consideration when they refused to grant permission to petitioner's organization for the use of school property to hold a forum for a discussion on war and peace. The objects and purposes of petitioner's organization, as set forth in the petition (Record, fols. 16-20) and the proposed subject of the forum discussions are, as pointed out in the opinion of the New York Supreme Court, Westchester County (Record, fols. 41-55), of an essentially controversial nature.

In *Matter of Stanton* v. *Board of Education, City of New York,* 190 Misc. 1012, the Court, in denying an application to review the determination of the Board refusing to adopt a resolution providing that the use of school buildings be denied to certain subversive and illegal groups, said, at page 1016, "the law is well established that courts will not interfere with the exercise of discretion entrusted by law to public officers or bodies unless it be clearly demonstrated that the act complained of violates a specific statute or is essentially arbitrary (*Matter of Marburg* v. *Cole,* 286 N. Y. 202, 208; *Matter of Small* v. *Moss,* 277 N. Y. 501, 507)."

The petition (Record, fols. 15-35) fails to show a clear legal right to the relief demanded. To obtain the relief sought it was incumbent upon petitioner to show a clear, absolute right to such relief.

In Re Donovan, et al., 65 N. Y. S. 2d 347 (not officially reported);

In Re Poland Milk Producers Cooperative Ass'n Inc., et al., 62 N. Y. S. 2d 794 (not officially reported);

Matter of Fahey v. *Wright*, 256 A. D. 474;
Matter of Mulry v. *Beckman*, 272 A. D. 780;
Roy v. *Board of Education*, 106 N. Y. S. 2d 451 (not officially reported).

III.

The rights guaranteed by the First and Fourteenth Amendments are subordinate to the greater rights of the general public interest.

In refusing to grant petitioner's organization permission to use a school for a forum on Peace and War the respondents have determined that the general public interest will best be served by not permitting such use. The rights guaranteed by the First and Fourteenth Amendments are subordinate to the greater rights of the general public and to the right of the government to maintain and protect itself.

Marshall v. *Unied States*, 176 Fed. Rep. 473;
U. S. Painters Local Union 481, 79 F. Supp. 516;
Kiyaski Omato v. *United States*, 152 F. 2d 905;
Matter of Stanton v. *Board of Education, City of New York*, 190 Misc. 1012;
Whitney v. *People State of California*, 274 U. S. 357;
Chaplinsky v. *New Hampshire*, 315 U. S. 568.

IV.

This proceeding does not present a substantial Federal question which should be reviewed by this Court.

There is no substance to the claim that the refusal of respondents to grant petitioner's organization permission to use a school for a forum on Peace and War is an unconstitutional restraint on free speech. The petition for a writ of certiorari should be denied for want of a substantial Federal question.

Halvajian v. *Board of Education of City of Inglewood*, 341 U. S. 913;
Lyon v. *Compton Union High School*, 341 U. S. 913.

V.

Conclusion.

The petition for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York should be denied.

Respectfully submitted,

J. Raymond Hannon,
Corporation Counsel,
City of Yonkers, N. Y.

John Preston Phillips,
Second Assistant Corporation Counsel,
City of Yonkers, N. Y.